WP(C) 2857/2006
BEFORE
THE HON'BLE MR JUSTICE A.K. GOEL.
THE HON'BLE MR JUSTICE UJJAL BHUYAN.
JUDGMENT AND ORDER (ORAL)
(A.K. GOEL, J.)-

This appeal has been preferred against the order dated 14.6.2006 passed by the learned Single Judge dismissing the writ petition of appellant for counting his seniority from the date of his initial ad hoc appointment instead of the date of regular appointment.

2. The appellant was appointed as Motor Vehicle Inspector under Regulation 3 (f) of the Assam Public Service Commission (Limitation of Function) Regulations, 1951, which permitted the appointment without recommendation of the Public Service Commission. The appointment was for a period up-to 4 months. The appointment of the appellant under such regulation continued from 31.10.1990 to 11.2.1991. The appointment in the cadre of Motor Vehicle Inspector is governed by the Assam Transport Services Rules, 1983. Under the said Rules, the appointment can be made only on the basis of the selection made by the Assam Public Service Commission.

3. The appellant claimed that since his ad hoc service was followed by regular service, the same ought to be counted in the cadre for seniority.

4. The claim of the appellant was rejected by the department. Aggrieved thereby, the writ petition was filed. The learned Single Judge rejected the claim of the appellant as under :-

The entitlement of an incumbent to have his period of service rendered under Regulation 3(f) counted for the purpose of determination of his seniority will be covered by the principles laid down by the Apex Court in the case of Direct Recruit Class II Engineering Officers Association's -Vs- State of Maharashtra and others Case, reported in (1990) 2 SCC Page 715. In paragraph 44 of the aforesaid judgment, certain principles have been laid down by the Apex Court on the basis of which the entitlement of an incumbent to have his ad hoc service counted for determination of seniority is required to be followed by the Courts. Propositions 'A' and 'B' would be relevant in the present case. There is a corollary to proposition 'A' as laid down in paragraph 44, which, at first blush may appear to be similar to what has been laid down in proposition 'B'. In a subsequent case i.e. State of West Bengal - Vs - Aghor Nath Dey and others, reported in (1993) 3 SCC 371 it has been made clear that the proposition 'B' would apply only to situations where an appointment which is otherwise in accordance with the Rules is made on ad hoc basis on account of a procedural irregularity. Only in such case it will be permissible to count the period of service rendered on adhoc basis for the purpose of determination of seniority. In the present case, appointment under Regulation 3 (f) cannot by stretch of imagination, can be said to be covered by what is stated in proposition 'B' as contained in paragraph 44. Appointment under Regulation 3 (f) is for a period of 4 months and any extension thereof, however, long, cannot be recognized by the Court to be an acceptable basis for counting of seniority.

5. The learned counsel for the appellant submitted that the appellant was continuing from the initial date of appointment and in such a situation, his seniority has to be counted from the date of first appointment. Reliance has been placed on the judgment of the Hon'ble Supreme Court in M.P. Palanisamy and others v. A. Krishnan and others, reported in (2009) 6 SCC 428. Reliance has also been placed on a judgment of the Division Bench of this Court in Tana Kaya Tara v. State of Arunachal Pradesh and others, reported in 2003 (1) GLT 331.

6. This stand has been opposed by learned counsel for the respondents. Refe

rence has been made to the policy decision taken by the Transport Department on 28.2.1978, which has been annexed as Annexure-1 to the affidavit-in-opposition to the appeal filed on behalf of the State is reproduced below :-

As per this Deptt's O.M. No.ABP-16/72/1 dtd. 28.2.78 the regular appointment can be treated only after 3(f) appointments are regularized with the recommendation of APSC and till then 3 (f) appointments are treated as adhoc appointment on the recommendation of APSC. The Hon'ble High Court has already given an order dtd. 25.2.2005 on such cases against WP(C) No.1256 of 2004. The Hon'ble Supreme Court also had given judgment that temporary service cannot be counted for seniority on a similar case in the year 1992. The APSC also offered views that the seniority of the officers may be fixed on the basis of the date of regularization of their services and in order of preference in the select list. The Dy. L.R. with the approval of L.R. has already opined that the applicants were appointed under Reg. 3(f) of APSC as such their appointments were on ad-hoc basis and said that the Supreme Court has not stated that the ad-hoc appointees whose services have been subsequently regularized are entitled to seniority from the date of their ad- hoc appointment vide endt. dtd. 12.7.01 in file No.TMV.233/93 at page 21/N. The judgments of the Supreme Court referred by the claimants/ applicants is not applicable to their case as said in that endorsement.

As per Rule 24 of the Assam Transport Service Rules, 1983 seniority of a member in a cadre should be determined according to order of merit in respect of select list.

As such, under above discussion, in terms of Personnel (B) Deptt's O.M. No.ABP.16/72/1 dtd. 28.2.78, Assam Transport Service Rules, High Court order and Supreme Court order, this Deptt. sticks that the 3(f) appointees will not get seniority for the period they worked on ad-hoc basis. Their seniority shall be counted as per APSC Select list or from the date of their services are regularized by the Govt.

Accordingly the gradation list may be finalized as viewed by this Deptt.

7. Reliance has also been made on the judgment of the Division Bench of this Court in Dr. Pynshngain Phyllei v. Dr. Sarin K. Sangma and others, reported in (2011) 3 GLT 306. Following earlier judgments, it was held that the appointment under Regulation 3(f) of the Regulation did not quality for seniority in the regular cadre.

8. Question for consideration is as to whether the period of service rendered prior to regularization is liable to be counted for seniority in the cadre.

9. The issue is no longer res integra. The Constitution Bench of the Hon'ble Supreme Court in Direct Recruit Class II Engineering Officers Association's v. State of Maharashtra and others, reported in (1990) 2 SCC Page 715 held the period of service prior to regularization is not to be counted for seniority. The position was clarified in Aghor Nath Dey (supra) to the effect that for counting the ad hoc service for seniority, the initial appointment has to be as per rules. In the present case, the initial appointment was not in the cadre as per rules. The appointment was made without consultation with the Public Service Commission on ad hoc basis. The appointment of the appellant was made without following due procedure of law for appointment in the regular cadre. The service of the said appellant was later regularized by the department. The initial appointment of the appellant was not the appointment to the service as per rules applicable to the cadre. In these circumstances, learned Single Judge rightly held that ad hoc service could not be counted for seniority. We do not find any ground to interfere with the view taken by learned Single Judge.

10. Accordingly, this appeal is without merit and the same is accordingly, dismissed.